AFFIRMED; Opinion Filed June 9, 2020.

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00984-CR

JENNIE FRAZIER GITAU, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F13-30933-S

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Carlyle

A jury convicted appellant Jennie Frazier Gitau of aggravated assault with a deadly weapon, assessed punishment at three years' imprisonment and a $1,000.00 fine, and recommended that the sentence and fine be probated. The trial court placed Ms. Gitau on eight years' community supervision and probated the fine.

Four years later, on the State's motion, the trial court revoked Ms. Gitau's community supervision and sentenced her to three years' imprisonment. Ms. Gitau now contends she was denied her common law right of allocution and that her "grossly disproportionate punishment" violated her rights under the Eighth

Amendment and the Texas Penal Code. We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

In 2013, Ms. Gitau and several of her family members drove to the complainant's home. Ms. Gitau's family and the complainant's family fought. Ms. Gitau had a deadly weapon. In 2015, a jury convicted and sentenced Ms. Gitau as charged, and we affirmed. *See Gitau v. State*, No. 05-15-00235-CR, 2015 WL 6550802, at *1 (Tex. App.—Dallas Oct. 29, 2015, no pet.) (mem. op., not designated for publication). In 2017, the State moved to revoke Ms. Gitau's community supervision based on her assaulting a family member. Ms. Gitau pleaded true to the State's allegations. The trial court allowed her to remain on community supervision with modified conditions.

Later that same year, the State again moved to revoke community supervision, this time based on Ms. Gitau's failure to report to her supervision officer and pay various fees. Ms. Gitau again pleaded true to the State's allegations. At the April 2019 revocation hearing, Ms. Gitau testified she stopped reporting to her supervision officer in August 2017 because of multiple hardships involving her family, her mental health, and her lack of financial resources. She described those hardships in detail and requested the court continue her on community supervision or sentence her to less than three years' imprisonment.

After both sides closed, the trial judge described talking with Ms. Gitau about her "struggles" on several prior occasions during her community supervision and

telling her "all I want you to be is responsible." The trial judge stated, "[T]he responsible person is gonna come in and say, Judge, this is what my problem is. . . . And then you work on it. You don't disappear for two years. . . . I told you before that your actions would determine what happened. And if you want probation then your actions would reflect that." Then, the trial judge asked Ms. Gitau's counsel, "[I]s there any legal reason why sentence should not be imposed?" Counsel answered "no" and the trial court sentenced Ms. Gitau to three years' imprisonment.

Ms. Gitau first asserts the trial court violated her common law right to allocution. "Allocution" refers to a trial judge affording a criminal defendant the opportunity to "present his personal plea to the Court in mitigation of punishment before sentence is imposed." *McClintick v. State*, 508 S.W.2d 616, 618 (Tex. Crim. App. 1974) (op. on reh'g). We have repeatedly rejected this issue when, as here, there was no objection at trial; Ms. Gitau did not preserve this issue for appellate review. *See Loring v. State*, No. 05-18-00421-CR, 2019 WL 3282962, at *5 (Tex. App.—Dallas July 22, 2019, no pet.) (mem. op., not designated for publication); *Hall v. State*, No. 05-18-00442-CR, 2019 WL 3955772, at *1 (Tex. App.—Dallas Aug. 22, 2019, pet. ref'd) (mem. op., not designated for publication); TEX. R. APP. P. 33.1(a)(1).

In her second issue, Ms. Gitau contends the trial court "imposed a grossly disproportionate punishment," violating the prohibition on cruel and unusual punishments. *See* U.S. CONST. amend. VIII. To preserve error for appellate review,

even for certain constitutional rights like this one, the record must show the appellant made a timely request, objection, or motion, but we have none here. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); TEX. R. APP. P. 33.1(a)(1). Ms. Gitau failed to preserve this complaint for appellate review. *See Rhoades*, 934 S.W.2d at 120; *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.).

Ms. Gitau's complaint would fail even if properly preserved. Sentencing judges have a great deal of discretion. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). Ms. Gitau faced a term of two to twenty years' imprisonment. *See* TEX. PENAL CODE §§ 12.33, 22.02(a)(2). Her three-year sentence is near the bottom of that range and was imposed only after the court gave her several opportunities to successfully comply with community supervision requirements. Generally, "punishment assessed within the statutory limits . . . is not excessive, cruel, or unusual." *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016); *accord Foster v. State*, 525 S.W.3d 898, 910 (Tex. App.—Dallas 2017, pet. ref'd). Ms. Gitau directs us to no evidence or similar cases for comparative evaluation. *See Simpson*, 488 S.W.3d at 323; *Simmons v. State*, 944 S.W.2d 11, 15 (Tex. App.—Tyler 1996, pet. ref'd).

In her third issue, Ms. Gitau contends the trial court's three-year sentence "violated [her] rights under the Texas Penal Code's direct expression of the objectives the Texas Penal Code as a whole is supposed to serve and achieve." *See*

TEX. PENAL CODE § 1.02. Ms. Gitau did not assert this complaint in the trial court and thus has failed to preserve it for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *Thornton v. State*, No. 05-16-00565-CR, 2017 WL 1908629, at *4 (Tex. App.—Dallas May 9, 2017, pet. ref'd) (mem. op., not designated for publication). Had she preserved this complaint, we would resolve it against her for the same reasons we would have rejected her Eighth Amendment complaint. *See Jackson*, 680 S.W.2d at 814; *Thornton*, 2017 WL 1908629, at *5.

We decide Ms. Gitau's three issues against her and affirm the trial court's judgment.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JENNIE FRAZIER GITAU, Appellant	On Appeal from the 282nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F13-30933-S.
No. 05-19-00984-CR V.	Opinion delivered by Justice Carlyle. Justices Whitehill and Osborne participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 9th day of June, 2020.